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In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC.,

UNITED STATES OF AMERICA,

AND

SECRETARY OF AGRICULTURE, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward S. Rogers

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Petitioner Federal Maritime Board respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, filed November 9, 1956, setting aside certain orders of the Board.[1]

OPINION BELOW

The opinion of the Circuit Court of Appeals, which has not as yet been reported, is attached as Appendix A.

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[1] A certified copy of the record in the Court below has been filed with the Clerk of this Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1956 (R. 251). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) (62 Stat. 928), as prescribed by 5 U. S. C. Section 1040 (Section 10, 64 Stat. 1132).

QUESTION PRESENTED

Whether a system of ocean steamship rates of the kind commonly known as a "dual rate system" is *per se* illegal under section 14, Third, Shipping Act, 1916, with the result that the Board may not under section 15 of that Act approve an agreement to use such a system.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, as amended, 46 U. S. C. 801 *et seq.*, are set forth in Appendix B.

STATEMENT OF THE CASE

The Japan-Atlantic and Gulf Freight Conference (the "Conference") is a voluntary association of common carriers by water serving the inbound trade from Japan to ports on the United States Atlantic and Gulf coasts. The Conference exists by virtue of its organic agreement, approved by the Board[2] under section 15, Shipping Act, 1916.

[2] "Board", as used in this Petition, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U. S. C. 804, 39 Stat. 728), and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, by the United States Maritime Commission by the Merchant Marine Act, 1936, section 204 (a) (46 U. S. C. 1114, 49 Stat. 1987) and by the Federal Maritime Board by Reorganization Plan No. 21, section 104 (15 F. R. 3178).

Section 15 (46 U. S. C. section 814, Appendix B, pp. 44–48) authorizes the Board to approve agreements among common carriers by water or other persons subject to the Act. Among the enumerated agreements are those fixing rates or giving special rates. Agreements subject to section 15 are exempt from the antitrust laws. The section authorizes the Board to disapprove any agreement that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, and directs it to approve all others.

On December 24, 1952, the Conference filed a statement with the Board announcing their proposal to initiate a system of rates of the type commonly known in ocean transportation as a "dual rate system". The Conference's proposal resulted from conditions in the trade, discussed below, which subsequently were found by the Board to justify the use of the system.

Under the proposed dual rate system, contract rates on virtually all commodities would be given to those shippers promising to ship exclusively via Conference vessels, and all other shippers would be charged a regular conference tariff rate 9½ percent higher than the contract rate. The shipper's promise is embodied in a "Shipper's Rate Agreement" (R. 203–206) which, among other things, provides for liquidated damages to be assessed against contracting

shippers who violate the agreement by shipping via a non-Conference line. Thus, the dual rate system contemplates two levels of rates, separated by a fixed differential, the lower of which is made available to shippers who agree exclusively to patronize the Conference members.

After receiving protests against the Conference proposal by Isbrandtsen Company, Inc. (Isbrandtsen), on January 12 and January 19, 1953 (R. 207-209), and by the Department of Justice (R. 209–211), the Board, on January 24, 1953, ordered a hearing on the protests. The Department of Agriculture intervened in the proceeding.

A complete record was taken before a hearing examiner of the Board. Exceptions to the Examiner's recommended decision and replies thereto were filed, and oral argument was heard by the Board. The Board issued its Report on December 14, 1955 (R. 19–69), and on December 21, 1955, and January 11, 1956, the Board issued orders approving the Conference agreement adopting the dual rate system (R. 73–74).[1]

By stipulation of the parties, the findings of fact made by the Board in its Report of December 14, 1955, are to be taken as true for purposes of Court review (R. 230–235). These findings, leading to the Board's approval of the Conference proposal, may be summarized as follows:

The Conference is a voluntary association of seventeen steamship lines. The present Conference mem-

[1] The January 11 order clarified the December 21 order.

bership includes five United States-flag lines, eight Japanese-flag lines, and four lines of other foreign nationalities (R. 23).

Since World War II, Isbrandtsen has furnished the only non-conference berth (or common carrier) service in the trade. From 1947 to early 1949, Isbrandtsen operated from Japan to U. S. Atlantic ports via the Suez Canal. Since early 1949, it has operated an approximately fortnightly service from Japan to U. S. Atlantic ports via the Panama Canal as part of its eastbound, round-the-world service (R. 25).

Conference membership is open to any common carrier regularly operating or intending so to operate in the trade. Isbrandtsen has remained outside the Conference as a matter of choice, although invited to join (R. 25).

The trade is overtonnaged; that is, there is a considerable excess of vessel space over cargo offerings. Total sailings have risen sharply postwar (R. 27). American flag lines, including Isbrandtsen, but excluding American President Lines and Lykes,[1] carried 53 percent of the total berth cargo in the trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953. The Japanese lines, which began to reenter the trade in 1951, have carried an increasing share of the traffic (R. 27–28). The vessels of the Conference, and, to a lesser

[1] Lykes Bros. S. S. Co. serves U. S. Gulf ports only; American President Lines operates from Japan to Atlantic ports of the United States via the Suez Canal as a part of its westbound, round-the-world service. Neither line's carryings are materially important in the Conference trade.

extent, Isbrandtsen, had substantial free space after completion of loading in Japan (R. 28).

Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities, on the average, at a level approximately 10 percent below the corresponding Conference tariff rates. Conference increases in rates were followed promptly by Isbrandtsen increases, and when, in November 1952, the Conference announced a 10 percent reduction in rates, Isbrandtsen announced that its new rates would be 10 percent less than the effective Conference rates (R. 29). Because Isbrandtsen uniformly followed Conference rate increases with corresponding increases in its own rates, its participation in the trade, prior to the outbreak of the rate war, had little practical effect in keeping rates down (R. 68).

The Conference is at a competitive disadvantage as compared with individual lines in making rapid rate changes, because changes in Conference rates may only be made by an affirmative vote of two-thirds of the voting members (R. 30).

The statistical tables in the Board's Report reveal the effectiveness of Isbrandtsen's rate cutting tactics. In 1950, 1951, and 1952, respectively, Isbrandtsen made only 13 percent, 11 percent, and 10 percent of the sailings, but carried 34 percent, 30 percent, and 26 percent of all the cargo moving in the trade (R. 27). Indications that Isbrandtsen, prior to the opening of rates,[5] had planned to increase its service to

[5] By opening rates, Conference members discontinue the collective fixing of rates. Each member becomes free to fix its own rates independently of the other members.

three or four sailings per month leads to the conclusion that under closed single rates, Isbrandtsen's participation would have been further increased, most probably at the expense of non-Japanese Conference lines which do not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61).

At a special meeting on March 12, 1953, the Conference voted to open rates on ten of the major commodities moving in the trade in order to meet Isbrandtsen's competition. Subsequently, the Conference voted to open rates on most of the commodities that move in substantial volume in the trade (R. 30). After March 12, 1953, the level of rates dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00–$6.50 per ton, while the mere cost of loading and discharging the cargo in this trade is approximately $8.50 per ton. Isbrandtsen tried at first to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates. Since the rate war, Isbrandtsen has carried little cargo in the trade (R. 31).

Many Japanese shippers have requested the Conference to close rates and to end the rate war. The resultant instability has adversely affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the

value of inventories of Japanese goods in the United States; and has caused requests for postponement of shipment by f. o. b.[6] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Resale prices of Japanese goods are often fixed by the importers as much as six months in advance of their arrival in the United States (R. 32).

Each of the shippers testifying before the Board in this proceeding gave his general support to the use of dual rates as proposed by the Conference (R. 33).

In the light of these facts, the Board considered inauguration of a dual rate system to be necessary to enable the Conference to meet its non-conference competition (R. 60), and found that institution of the system will result in greater stability of rates and service, facilitate forward trading, and decrease the threat of rate wars (R. 61–62). The Board further found that the 9½ percent spread was reasonable and would probably allow Isbrandtsen to retain 10 percent or more of the cargo moving in the trade (R. 62).

Isbrandtsen petitioned the Court below to review the Board's Orders and applied for an interlocutory injunction pending such review. On February 10, 1956, an interlocutory injunction was granted, and after consideration of the merits, the Court below issued its decision of November 9, 1956, which the Board now asks the Supreme Court to review.

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[6] Most commodities in this trade are sold on a f. o. b. basis (R. 32).

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS

The decision below should be reviewed by this Court because: (1) It declares unlawful the "dual rate" system now in use by scores of conferences, including virtually every steamship line in the foreign trade of the United States, and would have a disastrous impact on the higher-cost American-flag carriers, as well as a profoundly unsettling effect upon nearly all shippers and consignees in the foreign commerce of the United States. (2) The decision undoes decades of administrative and regulatory practice under the Shipping Act, 1916, and cannot be reconciled with decisions of this Court including *Swayne & Hoyt v. United States*, 300 U. S. 297, 304 (1937), which stated that the use of the dual rate system in any particular trade is to be judged on the basis of "whether its effect was to exclude other carriers from the traffic, and if so, whether * * * it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (3) The Court below reached its result by an unprecedented and erroneous construction of Section 14, Third, of the Act.

E. THE PUBLIC IMPORTANCE OF THE ISSUE

The decision below condemns, as illegal *per se*, the dual rate system, and would prohibit its use in the foreign commerce of the United States. It would strip from the carriers engaged in this commerce, and

from their shippers and consignees, their only available safeguard against destructive competitive practices.

Competitive relationships between ocean carriers in foreign commerce are extremely precarious. They are subject to dynamic influences which are absent in the case of domestic transportation. In the first place, ships of different nationalities operate under widely varying cost factors. Ships of United States registry, for example, have the most demanding manning scales in the world, and have wage rates far in excess of those of any other nation; even among the various foreign nationalities, the cost of ship operation varies over a wide range. Similar variations obtain in capital costs. Secondly, the freedom of the seas permits carriers to enter service whenever and wherever they choose—a freedom not available to domestic carriers. Thirdly, the level of rates is not subject to control by any government. The volatility of rates is therefore free of those inhibiting powers granted by statute to regulatory agencies interested in domestic transportation. Finally, the cost of carrying additional lots of cargo on board a ship already committed to sail is very small. This "added cost" feature makes it possible for carriers to obtain substantial profits even at relatively low rates if, as a result of a special competitive advantage, as here, it is able to fill its ships. This furnishes a strong incentive toward cutthroat competition.

These basic facts of ocean transport have led to the evolution of carrier practices aimed at preventing the outbreak of chaotic rate wars. In almost every major

trade in the world, the carriers serving such trades have joined in conferences, for the purpose of establishing scales of rates common to all the carriers. So long as all of the carriers in a trade adhere to the conference tariff, stability of rates and service may be achieved. If, however, a competing carrier cuts rates and is able thereby to divert substantial quantities of traffic from the other lines, an almost irresistible impetus toward a rate war is created.[7]

The existence of a conference in a trade is therefore not always enough, by itself, to maintain stability of rates and service. In worldwide trades which

[7] The Alexander Committee, whose extensive investigation of the shipping industry and four volume report, H. R. Doc. 805, 63d Cong., 1914 (hereinafter the Alexander Report), were the basis for the Shipping Act, 1916, recognized these considerations, and the Act was patterned with them in mind. The recommendations in the Alexander Report contain the following statement (4 Alexander Report, 416):

"These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement."

do not include the foreign commerce of the United States, the deferred rebate system,[3] as well as other competitive devices, have been widely employed. Certain of these competitive practices were expressly condemned by the Alexander Committee, and prohibitions against their use were enacted in the Shipping Act, 1916. Thus, deferred rebates (section 14, First), fighting ships (section 14, Second), retaliation by refusal of service (section 14, Third), and unfair contracts based on volume of freight offered (section 14, Fourth), are unlawful in trades to and from the United States.

But the dual rate system has long been considered to be available to carriers under the Shipping Act, 1916, as a defensive device to meet the competitive problems inherent in ocean shipping. Virtually every major American-flag line in the essential trades in the foreign commerce of the United States is a member of one or more of the 62 conferences presently employing dual rates as a method of maintaining stability of rates and service.[4]

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[3] A deferred rebate system is one in which shippers promise to patronize the Conference members exclusively for a period of time, typically a year, in return for which they are given a rebate, usually fixed in terms of a certain percentage of the tariff rates. The rebate is payable at some time after expiration of the contract period, for example, six months after the contract year has ended. A shipper who patronizes a non-conference line during the contract period or during the following six months, or who fails to renew his contract at the end of the period, forfeits the rebates accrued to his credit.

[4] These figures have been taken from the records of the Board's Office of Regulation, which maintains current information on the activities and status of all section 15 agreements.

In addition, two pending applications to institute the system

The decision of the Court below directly and critically affects each one of these trades. It would require abandonment of the system by every conference now using it, and it would make the system unavailable to all other conferences as a defensive device should the incursions of rate-cutting competition become intolerable. Not alone are carriers affected, but also shippers, for it alters with a single stroke commitments governing the movement of huge quantities of traffic and would deprive the shippers of the stability they seek in entering into the shipper's rate agreements. By reason of its broad implications, this litigation has been given considerable attention by executive departments of the Government. The Department of Justice, the Department of Agriculture, and the Federal Maritime Board each appeared in the proceedings below.

Moreover, the decision below may operate to impose very substantial liabilities upon members of conferences currently using dual rates. As noted above, more than half of the conferences now employ the system, and it has been contended that, should the decision below stand, their employment of the system will have been in violation of the Shipping Act, 1916. Not only is it contended that civil liabilities in the form of reparations are possible, but also criminal

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are the subject of litigation, one before the Board in F. M. B. Docket No. 795, and the other before the U. S. Court of Appeals for the District of Columbia in *Ezra Taft Benson* v. *United States and Federal Maritime Board, et al.*

liabilities, which, for violations of section 14, Third, may amount to a fine of not more than $25,000 for each offense.

2. THE DECISION BELOW OVERTURNS A GENERATION OF PRACTICE AND DECISION.

The Board and its predecessors have long believed that they have power to approve the dual rate system and have for many years acted upon that belief. The contention that the system is illegal *per se* has frequently been addressed to the Courts but has never before prevailed. The Court below explicitly recognized at p. 9 that "the dual rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system." (R. 244–245.)

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), the dual rate system was assailed in this Court as illegal *per se*, and the issue accordingly inappropriate for application of the doctrine of primary jurisdiction. This Court rejected the argument, and stated, at p. 487, that:

> Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Thereafter, in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937), this Court sustained an order of the Board prohibiting the use of dual rates in

the domestic intercoastal trades. Although the three-judge District Court below, which had also sustained the Secretary's order, *had ruled, in effect, that the system was illegal per se, the Supreme Court declined to go so far*, pointing out at p. 304 that:

> * * * Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgement of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citations omitted.]
>
> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. * * *

The Court further stated (p. 307, n. 3) that the Alexander Committee was fully informed of the contract rate system and expressly recognized the propriety of its use while condemning other systems. The Court therefore acknowledged that the dual rate system may be authorized under the Shipping Act where justified by the circumstances:

> The report of the House Committee on the Merchant Marine & Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it

operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41.

Next, in *Isbrandtsen Co., Inc.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941 (1949), the three-judge District Court enjoined a conference from instituting a dual rate system, conditioning its injunction on Isbrandtsen's diligent prosecution before the Board of a complaint challenging the lawfulness of the system. The District Court stated, with respect to a contention of Isbrandtsen that dual rates were necessarily illegal (at p. 546):

> It may be that the "exclusive patronage" provisions are prohibited by 46 U. S. C. A. § 812 [Section 14, Shipping Act] and that the Commission is powerless to approve such provisions under 46 U. S. C. A. § 814. *Very considerable doubt upon such a holding is thrown by Swayne & Hoyt, Ltd. v. U. S.*, 1937, 300 U. S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, *and by the legislative history of the Statute*, H. R. Doc. No. 805, 63d Cong., 2d Sess., 1914, 287–292.[10]

The subsequent court decisions on the subject of dual rates have held that the differential or "spread" between contract and non-contract rates must not be arbitrarily fixed, *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd by an equally divided Supreme Court *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950 (1952); that under the doctrine of primary jurisdiction, the Attorney General must first resort to the Board in bringing a complaint against a conference using dual rates, *Far East Conference* v. *United States*, 342 U. S. 570 (1952);[11] and that the institution of a dual rate system amounted to a new or modified agreement between the carriers, requiring prior Board approval under section 15 as a condition to legality, *Isbrandtsen* v. *United States*, 93 App. D. C. 293, 211 F. 2d 51 (D. C. Cir. 1954), cert. den. 347 U. S. 990;

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[10] Emphasis added throughout unless otherwise noted.

[11] Here, Justices Douglas and Black dissented on the ground that the system is *per se* unlawful and could not, therefore, be approved by the Board. The majority refused to decide the case on that ground.

River Plate and Brazil Conferences, et al. v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y., 1954).

Throughout the period covered by these decisions, the dual rate system was in extensive use. It seems plain that if the system were illegal *per se*, as was urged in each of the above cases, the outcome would long since have been outright condemnation of the system. Rather, the governing judicial pronouncement is that in *Swayne & Hoyt, supra*, which held not that the system is unlawful *per se*, but that it was for the Board to decide whether the system is reasonable or unreasonable. Guided by this doctrine, the Board has permitted the use of dual rates in those trades where their use has been shown to be reasonable and justified, and has condemned their use where not reasonable and justified.[12]

3. THE DECISION MISCONSTRUES SECTION 14 OF THE SHIPPING ACT, 1916

The Court below did not disagree with the Board's finding of urgent need for a competitive safeguard such as the dual rate system, but it construed section 14, Third,[13] as an "insuperable barrier" to approval of

[12] Dual rate systems have most recently been approved by the Board in the instant case and in F. M. B. Docket No. 725/751, covering the trade from U. S. North Atlantic ports to ports in Belgium, Holland, and the North Sea coast of Germany, and disapproved in F. M. B. Docket No. 743, covering the trade from ports in Japan, Korea, and Okinawa to ports on the Pacific Coast of North America.

[13] This section provides that no common carrier by water shall

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

the system no matter how desperate the competitive situation might be. On p. 7 of its opinion (R. 242), the Court states:

> We might agree with the Board that the objectives it seeks in approving the dual rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here [in section 14, Third] that we find an insuperable barrier.

And on p. 8 (R. 243), the Court states:

> True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it might otherwise be.

In nullifying the Board's approval of the system, the Court below erred in failing to construe section 14 as a whole, and it erred in failing to read the words "retaliate" and "discriminating" in the sense in which they were used in the Act.

A. The Decision Below Strips All Meaning From Section 14, First

Section 14, First, provides that:

> * * * no common carrier by water shall * * *
>
> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of

> the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

By its broad construction of section 14, Third, the Court has in effect written section 14, First, out of the Act. In the first place, it is obvious that if section 14, Third, outlaws the dual rate system, it must *a fortiori* outlaw the deferred rebate, for the latter is far more forceful and retaliatory a device than the former. Secondly, Congress took great pains to define in exact terms the "deferred rebate" outlawed by section 14, First, and thus, in effect, to distingush it from other forms of discount. Under the construction of the Court below, the deferred rebate, the ordinary rebate, and any other system of discount would all be prohibited, thus making the careful statutory definition in section 14, First, a nullity.

B. The Construction of the Court Below Fails To Distinguish Between Conference Actions Expressly Condemned and Those Impliedly Approved

In its "Summary of Conferences and Agreements," the Alexander Report (4 Alexander Report 287–293) describes certain practices then used by conferences for the purpose of "Meeting the competition of lines

outside the conference."[14] The first two practices described were deferred rebates and fighting ships. These were strongly condemned. The third practice described was (4 Alexander Report 290):

> 3. *Contracts with shippers which may be classified as:*
>
> (a) *Joint contracts made by the conference as a whole.* Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the *shipper agrees to confine all shipments to conference steamers,* and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms.*

Here is clear recognition and implied approval of a rate practice different in no essential feature from the dual rate system approved by the Board in the instant case.

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[14] The Alexander Committee condemned only "*certain*" and not *all* of the practices of conferences in "meeting the competition of lines outside the conference." See 4 Alexander Report 417, where the Committee expresses its concern with "the unfairness of *certain* methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines."

Subsequently, Congress carried over into section 14 an exact definition of "deferred rebate" and "fighting ship" as condemned by the Committee and made their use a crime. Were it intended, Congress would similarly have described and condemned the dual rate system. But the dual rate system was not so prohibited, nor was any such prohibition intended, even inplicitly, in section 14, Third.[15]

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[15] This conclusion is compelled by an analysis of the Committee's discussion of the methods used by conferences in meeting non-conference competition.

In describing deferred rebates, the Alexander Report, at Vol. 4, p. 287, states:

"Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, *is under constant obligations to the conference lines*, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates."

The Report, at Vol. 4, p. 307, points out "*That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

"(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*"

The feature of the deferred rebate system which outraged the Committee was its placing of shippers in *continual dependence*. Section 14, First, was so phrased as to make absolute the prohibition against this feature. *It is most significant that the Committee here took pains to distinguish this condemned system from the "ordinary contract system,"* which "does not place the shippers in the position of continual dependence." See, *Swayne & Hoyt* v. *U. S.*, 300 U. S. 297, 307, n. 3 (1937). It should be noted that the shipper contract here presented permits the shipper to withdraw on three months' notice.

The Court below, at pp. 13–14 (R. 248–249), seeks to distinguish between the contracts known to and impliedly approved by the Alexander Committee and those before the Court. The decision states that in the 1913 contracts, "The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price." Neither ground for distinction can survive analysis.

As to the price provisions, the Court's footnote 3 on p. 14 (R. 249) informs us that "In most of these [1913] contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs." The contracts in the instant case provide that "Increases shall not become effective until the expiration of the calendar month during which notice is given and of the two calendar months next following * * *. Should the Carriers during the period of this Agreement reduce rates on any commodity on which Contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates * * *" (R. 203). Thus, the price provisions in the 1913 contracts and current contracts differ only as to the period (two to three months, as compared to six months)[16] during which the price guarantees are to last.

As to the space commitments in the old and new contracts, the Court's distinction is inconsequential. The 1913 contracts were not, as shown by the testi-

[16] The Court below on p. 14 (R. 249) states that in the 1913 contracts "* * * the price was fixed for the term of the contract (usually 6 months) * * *."

mony before the Alexander Committee, primarily meant to furnish space guarantees. See, for example, testimony at 1 Alexander Report 96. Of more importance, however, is the fact that the dual rate system is a defensive weapon which may be instituted with Board approval only in trades where a rate-cutting nonconference line makes serious inroads upon the conference carryings, i. e., leaves the conference members with substantial unused space.[17] In such a situation, the last thing the shipper needs is a guarantee of space from the conference.

Far more important than their minor differences is the inherent similarity between the major features of the 1913 contracts and the ones involved here. Both provide for exclusive patronage; both call for the use of a dual schedule of rates.

C. The Construction of the Court Below Is Inconsistent With the Intended Meaning of Retaliation as Evidenced by the Legislative History

The legislative background of section 14, Third, clearly proves that it was not intended to outlaw the dual rate system. When the Alexander Committee dealt with "retaliation", it commented, 4 Alexander Report 288:

> Moreover, as has been repeatedly pointed out in this volume, *shippers require, above all else, a regular service,* and in this connection the testimony shows that by patronizing an outside line the shipper would not only *forfeit his rebates* but could ~~not~~ be penalized *by being denied*

[17] See Board decisions in F. M. B. Dockets No. 730, 725/751, and 743.

> *accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times.

It is obvious that the retaliation with which the Committee was concerned was (a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by denial of space for future shipments even at the full rate. The former evil could be, and was, cured by the prohibition of deferred rebates. That left unremedied the second evil, described by the Committee as deprivation of regular service (which "shippers require, above all else"), as denial of accommodations, and as being "unprotected" by having to rely only on such independent tonnage as may be available."[18]

And in making its ultimate recommendations, the Committee stated: "A considerable number of complaints were also filed with the Committee objecting to * * * the unfairness of certain methods—such as fighting ships, deferred rebates, and *threats to refuse shipping accommodations*—used by some conference lines to meet the competition of nonconference lines."

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[18] Repeatedly, wherever the Committee mentioned retaliation, it did so in terms that made it plain that they had in mind the concept of exclusion:

"* * * it was frequently suggested that the lines should be compelled to accept cargo from all shippers when offered with due regard to the proper loading of the vessel and the tonnage available, *and should be prohibited from refusing accommodations to any shipper by way of retaliation because* he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons." 4 Alexander Report 313.

4 Alexander Report 417. These methods were the ones condemned in section 14, Second, First, and Third, respectively. *Plainly, the Committee's recommended prohibition against retaliation was aimed at practices whereby shipments would be excluded from carriage. Under the dual rate system, there is never a denial of space or services; instead, the same space and services open to contract shippers are made available to the nonsignatory shipper at the full rate and, if he sees fit to sign, he may at any time do so and secure space at the contract rate.*

D. The Construction of the Court Below Places Unwarranted Emphasis on the Absence of the Adjective "Unjust" Before the Word "Discriminating" in the Phrase "Other Discriminating or Unfair Methods" While Failing to Recognize That the Concept of Unjustness is Clearly Implied

The decision below rests in the end on the exaggerated importance given to the absence of the single word "unjustly" as a modification of the word "discriminating" in section 14, Third. The Court below appears to hold that had the draftsmen added this routine word, the result would have been different (R. 241–242, 243, 244, 246).

As we have shown, the retaliation condemned by the Alexander Report was the refusal of space or service to shippers. The Committee's final recommendation was that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting *to other unfair methods* of discrimination * * *."

It is clear that the Committee was concerned about *unfair* discriminations, serving to exclude shippers from full service, and did not intend to make criminal discriminations which were fair or reasonable. In deed, the courts have held that the word discrimination, when used in a statute without any qualifying adjective, means *unjust* discrimination. As stated in *United States* v. *Wells Fargo Express Co.*, 161 F. 606, 610 (C. C.-N. D. Ill., 1908), "* * * It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue." See also *Platt* v. *LeCocq.*, 150 F. 391, 397 (C. C. D. S. D., 1906), where the Court construed the unmodified words "prejudice and disadvantage" used in a South Dakota transportation statute to mean "unreasonable prejudice or disadvantage".

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD D. RANSOM,
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EDWARD APTAKER,
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EDWARD SCHMELTZER,
Attorney,
Office of General Counsel.
WASHINGTON 25, D. C.
Date: January 24, 1957.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13027

ISBRANDTSEN COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD, RESPONDENTS

THE SECRETARY OF AGRICULTURE, INTERVENOR

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., INTERVENORS

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL MARITIME BOARD

Decided November 9, 1956

Mr. John J. O'Connor for petitioner.

Mr. Daniel M. Friedman, Attorney, Department of Justice, with whom *Messrs. Neil Brooks*, Assistant General Counsel, United States Department of Agriculture, and *Donald A. Campbell*, Attorney, United States Department of Agriculture, were on the brief for respondent United States of America, and intervenor The Secretary of Agriculture, *Mr. Charles H. Weston*, Attorney, Department of Justice, also entered an appearance for respondent United States of America.

Mr. Edward D. Ransom, General Counsel, Federal Maritime Board, with whom *Messrs. James L. Pimper,* Assistant General Counsel, Federal Maritime Board, and *Edward Schmeltzer,* Attorney, Federal Maritime Board, were on the brief, for respondent Federal Maritime Board.

Mr. Elkan Turk, with whom *Messrs. James M. Landis* and *Elkan Turk, Jr.,* were on the brief, for intervenors Japan-Atlantic and Gulf Freight Conference, et al. *Messrs. Abba P. Schwartz, Seymour J. Rubin* and *Wallace M. Cohen* also entered appearances for intervenors Japan-Atlantic and Gulf Freight Conference, et al.

Before PRETTYMAN, FAHY and WASHINGTON, *Circuit Judges.*

FAHY, *Circuit Judge:* Pursuant to 64 Stat. 1130 (1950), 5 U. S. C. § 1034 (1952), Isbrandtsen Company, Inc., petitions as a party aggrieved for review of orders of the Federal Maritime Board which are described as a Report served December 14, 1955, and orders served December 21, 1955, and January 11, 1956. The respondents are the Board and the United States, the latter being a statutory respondent under section 1034, *supra.* The United States, however, represented by the Attorney General, has joined Isbrandtsen in attacking the validity of the orders under review. The intervenors are the Secretary of Agriculture, supporting Isbrandtsen, and the Japan-Atlantic and Gulf Freight Conference, defending the orders of the Board.

The Conference is a voluntary association of 17 steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America. Five of the members are American, eight are Japanese, and four are of other nations. The primary purpose of the Conference is to establish and maintain agreed rates among the members. The

basic agreement under which the Conference operates was approved by a predecessor agency of the Federal Maritime Board in 1934 under section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952).[1]

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[1] Section 15 provides in pertinent part:

"Every common carrier by water * * * shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the volume of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"* * *

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto."

Isbrandtsen is not a member of the Conference, although membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Since shortly after World War II Isbrandtsen has been the sole non-Conference line which has maintained a berth service in the Japan-Atlantic trade. This trade is overtonnaged and consequently the vessels of both Isbrandtsen and the Conference have had a substantial amount of free and usable space after completion of loading in Japan. Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities an average of 10 percent below the rates established by Conference members under their agreement. Isbrandtsen's share of the business during this period was substantial, and its average carryings per sailing were much higher than were the average carryings of the Conference lines. In order to meet this competition the Conference members voted to adopt the exclusive patronage contract non-contract/dual-rate system described below, but when the Conference was restrained by this court from putting this system into effect prior to its approval by the Board the Conference, on March 12, 1953, opened the rates on ten major commodities. This permitted the member lines to set their own rates and to compete effectively with Isbrandtsen.

After March 12, 1953, rates dropped sharply, even to noncompensatory levels with respect to some commodities. In May, 1953, Isbrandtsen established minimum rates below which it would not go. This adversely affected its competitive position, so that since that date Isbrandtsen has carried little cargo in the trade.

On December 24, 1952, before rates had been opened by the Conference, it had filed with the Board, pur-

suant to the latter's General Order 76,[2] a statement advising the Board of the Conference's intention to institute in 30 days an exclusive patronage contract/non-contract dual-rate system in the Japan-Atlantic trade, hereinafter referred to as the dual-rate system. Under the proposed system shippers who declined to sign an exclusive patronage contract with the Conference would be charged rates 9½ per cent higher for the same transportation service than the rates charged shippers who enter into such contracts. Breach of the exclusive patronage contracts would be sanctioned by means of a liquidated damage clause under which a shipper who breaches the contract by shipping with a non-Conference line would be obligated to pay to the Conference 50 per cent of the contract rate on the shipment. The contract would be entered into for an indefinite period, subject to cancellation by either party on three months notice.

Protests against the proposed dual-rate system were filed by Isbrandtsen and the Department of Justice, who requested the Board to prohibit the Conference from implementing the system until after a hearing had been held. The Board granted the request for a hearing, but declined to suspend operation of the dual-rate system, stating that the system appeared to be in compliance with the Shipping Act.

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[2] Section 236.3 of that Order, 17 F. R. 10175, 46 C. F. R. 236.3, provides that steamship freight conferences proposing to establish contract/non-contract rates should file with the Board a statement containing:

"(a) The amount of the spread or differential * * *.

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto."

On petition for review in this court, we held that section 15 of the Act, note 1, *supra*, required the Board to approve the dual-rate system before it could legally be initiated. *Isbrandtsen Co.* v. *United States*, 93 U. S. App. D. C. 293, 211 F. 2d 51, *cert. denied*, 347 U. S. 990. Consequently we set aside the action of the Board allowing the system to go into effect without such approval, and enjoined the Conference from acting under the system until it was approved by the Board. Thereafter the Board's hearings resulted in its approval of the dual-rate system in the orders which are now here for review.

If the arrangements in question are such as the statute authorizes the carriers to make or the Board to approve, they are exempt from the inhibitions of the antitrust laws under section 15, note 1, *supra*. In providing for such exemption, however, the statute also places definite limits. For example sections 16 and 17 of the Act provide "it shall be unlawful" for any common carrier by water, alone or in conjunction with another, to

> "make or give any undue preference or advantage to any particular person,"

or to

> "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *."

The Board strongly urges that the dual-rate system cannot be said to give any "undue preference or advantage" or to constitute a demand, charge, rate or fare which is "unjustly" discriminatory. It says that because of competitive conditions in the trade the preference is not "undue" or the discrimination "unjust." In explaining these conditions the Board points to the differences in the operating costs of carriers of different nationalities, to the need for stability of rates and services, to freedom of any

steamship company to enter this trade in contrast to the requirements of the Interstate Commerce Act that there be a finding of public convenience and necessity, to the relationship between costs of operating and the quantity of cargo carried, and to other factors, all of which, in the view of the Board, are shown by the record and support the Board's findings that the inauguration of the dual-rate system is a necessary competitive measure to offset the harmful effect of non-Conference competition in an overtonnage trade subject to the injurious practice of undercutting of Conference rates. The Board points furthermore to its finding that the dual-rate system will decrease the possibility of continued rate wars with their disastrous consequences to American-flag lines, consequences repugnant to the purposes of the Act to encourage the development and creation of a naval auxiliary and reserve, and a merchant marine able to meet the requirements of the commerce of the United States with foreign countries.

We might agree wtih the Board that the objectives it seeks in approving the dual-rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here that we find an insuperable barrier. Section 14, Third, of the Act provides that no common carrier by water shall

> "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

As we have seen, shippers who decline to sign an exclusive patronage contract with the Conference would be charged for the same transportation service rates

9½ per cent higher than those charged shippers who enter into such contracts, and breach of contract by one who does sign would entail liquidated damages of 50 per cent of the contract rate. While in terms the 9½ per cent higher rate is for failure to enter into an exclusive patronage contract rather than for actually shipping via a non-Conference carrier in reality the higher rate is for the latter, as are the liquidated damages. Each of these aspects of the dual-rate system is hinged to a shipper giving patronage to another carrier. This is explicit in the provision for liquidated damages, which is part and parcel of the dual-rate system and gives color to the whole; and it is implicit in the difference between the contract rate and the higher non-contract rate. When the latter is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident. Both provisions, therefore, come within a fair meaning of retaliation. Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for "any other reason," which would include failure to enter into the exclusive contract arrangement. True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it otherwise might be. That provision prohibits not only

retaliation by a refusal, or threat of refusal, of available space accommodations but also by "resort to other discriminating" methods. In the circumstances stated, the charge of a higher rate for the same service and facilities, or the imposition of the liquidated damages, is *prima facie* discriminatory, *Swayne and Hoyt, Ltd.* v. *United States,* 300 U. S. 297, and for the reasons we have outlined we think that it is also a method of retaliation. This is the thrust of these provisions under a fair reading of the language adopted by Congress. And since these provisions are unlawful the system containing them cannot validly be approved by the Board.

We cannot accept the argument that section 14, Third, must be re l, in view of the terms of the Act as a whole, to condemn only retaliation which the Board might on a particular record find "unfair" or "unjustly discriminatory," terms used in other parts of section 14 and in sections 15 and 17. Where the conduct is retaliatory and constitutes discrimination, it is unlawful without more, unless its impact is unsubstantial, a subject we need not consider. Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board. *Swayne and Hoyt, Ltd.* v. *United States, supra.* There the court in effect approved an order of the Secretary of Commerce, the predecessor of the Board, which had condemned a higher rate for a shipper who used a carrier other than a member of the Conference. The court said the differential was *prima facie* discriminatory since the two rates were charged for identical services and facilities leaving for decision in the first instance by the Secretary, the question

whether the discrimination was "undue" or "unreasonable." The Secretary having concluded that it was, the court, considering the case under section 16, would not disturb his conclusion, which was in part based upon his finding that the operation of the contract system in the circumstances "does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act * * *." Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates. For while it is not one of the methods specifically condemned by section 14, as are deferred rebates and fighting ships, nevertheless retaliation is specified in subparagraph Third of section 14 as a method which may not be resorted to when discriminatory.

We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne and Hoyt, Ltd.* v. *United States, supra,* which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States,* 343 U. S. 570, the court, adhering to principles previously laid down in *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U. S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States,* 96 F. Supp. 883, which had invalidated the dual-rate system there in-

volved, not under section 14, Third, but because the spread between the two rates was found to be arbitrary. From this situation in the courts the Board contends that the dual-rate system has not been considered invalid *per se*, otherwise the courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point. And for the reasons which we have indicated we are of the opinion that additional legislation would be needed to permit the system, in the form here approved by the Board, to obtain the approval of the courts. Congress, after long consideration, lodged very substantial powers in the Board; but we find no language in the statute which, given its fair meaning, permits the Board to grant exemption from the anti-trust laws, or to make lawful a discriminatory rate, or the imposition of liquidated damages, for patronizing a competitor, for refusal to enter into an exclusive patronage contract with conference members, or for not shipping exclusively in accordance with such a contract.

We have considered the legislative history, particularly pertinent parts of H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914), known as the Alexander Report. The evils afflicting the industry due to uncontrolled competition on the one hand and unregulated carrier combinations on the other, are analyzed in this basic study preceding the Act. Reference is also made to H. R. Rep. No. 659, 64th Cong., 1st Sess. (1915);[3] H. R. 14337, 64th Cong. 1st Sess. (1915); S. Rep. No. 689, 64th Cong., 1st Sess. (1915).[4] We have found in this

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[3] This Report at pp. 30–31 refers to retaliation by refusing space accommodations or "other unfair methods of discrimination."

[4] In this Report, at p. 5, section 15 of H. R. 15455 is described in part as forbidding "retaliation, etc., against a shipper because such shipper has patronized any other carrier."

history no indication of an explicit intention by Congress to outlaw the dual-rate system, as is found with respect to deferred rebates and fighting ships. Furthermore, it is clear from its history, as from the Act itself, that not all discriminatory practices, and preferences are unlawful. On the contrary, the Board is authorized to approve many methods, including the formation of the conferences themselves, which would be unlawful except for the Act and Board action thereunder. But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminating method.[5]

Finally, we have considered the Board's position that the enumeration of deferred rebates and fighting ships as practices absolutely prohibited, in contrast with the failure to include in such enumeration the dual-rate system, indicates that the latter was not to be considered illegal *per se*. We do not accept this position because to do so would seem to us to give little meaning to the important provision of section 14, Third, that retaliation for any reason is also absolutely prohibited if it constitutes discrimination. We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character. Further discussion of the mat-

[5] Compare H. R. 17328, 63d Cong., 2d Sess., section 2, Third, with H. R. 15455, 64th Cong., 1st Sess., showing changes which add "unjust" to "discrimination" in certain parts in the Bill, but not in section 2, Third, which corresponded with section 14, Third, of the Act, where discrimination without qualification is prohibited when used as retaliation.

ter appears in Judge Washington's concurring opinion "in which, as in the present opinion, we all concur." *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513 (1945).

The orders of the Board will be set aside insofar as they approve the exclusive patronage contract/noncontract rate system.

WASHINGTON, *Circuit Judge*, concurring: I fully concur in Judge Fahy's opinion. However, certain additional observations may be made, with which both my colleagues agree, and which they have asked me to express on behalf of the court.

The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916[1] proscribe the type of contract here involved.

In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this "retaliation," proscribed by the Act? Certainly there seems no reason to limit "retaliation" to the dictionary definitions of "returning like for like" or "evil for evil," which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not "like for like," nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

Are these contracts, then, the sort of "discriminating or unfair methods" that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v.

[1] 39 Stat. 733, as amended, 46 U. S. C. § 812, Third (1952).

United States, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory."[2] Nevertheless, the Board urges that the literal meaning of the statute should not be followed.

The Board's basic contention is this: Since dual rate contracts were considered by Congress in its survey of shipping practices, the conspicuous absence of this device from the list of those specifically barred—deferred rebates, fighting ships, and boycotts—demonstrates an implied congressional endorsement of this devise. Were the premise sound, the argument would have some merit. But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge

[2] It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See *Swayne & Hoyt* v. *United States*, 18 F. Supp. 25, 26 (D. D. C. 1936).

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Section 16 (46 U.S.C. 815) 17, 21, 57, 59
Section 17 (46 U.S.C. 816) 17, 21, 57, 59
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on the part of both parties against fluctuations in rates.[3] In the contracts in suit the carriers' commitment as to space is almost illusory,[4] being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are here lacking.[5] In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers.[6] These differences are dis-

[3] For the text of the contracts considered by the Alexander Committee, see *Proceedings of the House Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2d Sess., Vol. 1, pp. 97, 120, 289 (1913). For the Committee's summary of these contracts, see H. R. Doc. 805, *supra* at 290–91. In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs. In other contracts the price stated was binding on both sides. See MARX, INTERNATIONAL SHIPPING CARTELS 202 (1953).

[4] See 1 CORBIN, CONTRACTS § 16 (1950).

[5] See, generally, Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. 412, 413 (1948).

[6] This is not to suggest that the liquidated damage clause would necessarily be unenforceable as a penalty, *cf. Pacific Westbound Conference* v. *Leval & Co.* (unreported) (Cir. Ct. Ore. 1951), cited in *Marx*, *supra* at 209, though it might be. See 5 CORBIN, CONTRACTS § 1054 (1951). It may be noted that compliance with the contracts used in 1913 was in many instances secured not by deferred rebates, see *Proceedings*, *supra* at 99, 204, 278, or by penalty clauses, *id.* at 96, but by threat of future boycotting, *ibid.*, a device specifically condemned in Section 14, Third. The contracts in this case would substitute for this blunt weapon the more refined techniques of penalty rates and liquidated damage clauses. Thus, instead of a retaliatory device to enforce a bona fide requirements contract, there are now retaliatory contracts, enforced by methods of seemingly equal effectiveness.

positive of the Board's principal argument. Implied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned.

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APPENDIX B

STATUTES INVOLVED

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.)

SEC. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

* * * * *

SEC. 15. (46 U. S. C. sec. 814.) Every common carrier by water or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement"

in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U. S. C. Sec. 815).

It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone

or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17. (46 U. S. C. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collect-

ing any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * * * *

SEC. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [board], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [board], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter [Act].